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No. 87-2136

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CITIZENS BANK OF CLOVIS; JEFF JACOBS; LYNELL G. SKARDA; OSCAR TOLIVER; and T. E. WILLMON, JR.,

PETITIONERS,

v.

ANN D. McLAUGHLIN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I

QUESTIONS PRESENTED

1. When a District Court orders that no more than one-third (1/3rd) of an ERISA pension fund can be in any "one type" of investment, does it mean just that or is it "overstated and meritless"?

2. Do United States' courts determine any issue "on an ad hoc basis"?

3. When a court finds investments "prudent", can the court concurrently find that such investments are improper for lack of diversification?

4. Can a District Court decide a defined benefit case based substantially on irrelevant issues not raised by counsel nor litigated, nor supported by any evidence such as no liquidity in the ERISA investment fund or inflation affecting the rate of return, or values "might decline"?

5. Despite the fact that well established trust law permits investment in different "classes" within a "type" of

investment, can a District Court abrogate the "class" distinction?

6. Is it proper for the District Court and Court of Appeals to refuse to determine whether an individual borrower's net worth meets petitioners' burden of showing that their failure to diversify was prudent?

7. Is it possible for the courts to require the trustees of ERISA pension funds to eliminate all risk when the statute only requires that they "minimize the risk"?

8. Is it improper for trustees of an ERISA pension plan to assert that they have a discretion in investing those funds?

DESIGNATION OF CORPORATE RELATIONSHIP REMAINS UNCHANGED FROM THAT STATED IN THE PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF FACTS

There are certain inaccuracies and misleading statements in the Brief of the Respondent in Opposition. The most glaring misstatement is that Respondent infers that the courts below found that the investments were not prudent. The trial court found "the evidence supports that each loan was prudent; however, that is not dispositive of the diversification inquiry." [Pet. App. A-1, p.12-13]. The second failure to state is that each of the loans was on a different "class" of real property and in different areas. In fact, the second largest participation was on farm and ranch property in De Baca County, New Mexico, some 63 miles west of Clovis, and San Miguel County, New Mexico, some 168 miles from Clovis in a northwest direction. Finally, there was no issue raised, evidence presented, nor brief had upon the issue of liquidity, rate of return, concentration in one investment, or the possibility of a decline in market value

of lands securing the mortgages, all of which are irrelevant. In fact, since this case was filed, the Pension Fund paid one of its retiring officers of 45 years employment $350,446.49, another retiring officer of 30 years $160,232.91, and $127,077.32 to the beneficiaries of a deceased officer. Finally, the response failed to mention that rate of return on and the liquidity of the pension fund investments are immaterial because this was a defined benefit plan, and the sponsor, The Citizens Bank of Clovis, had to annually bring the fund up to what was actuarially required.

ARGUMENT

1. INVEST NOT MORE THAN ONE-THIRD (1/3rd) OF THE PENSION PLAN ASSETS IN ONE INVESTMENT OR TYPE OF INVESTMENT.

The order appealed from limits the trustees' discretion to one-third of the assets in one investment or type of investment.

[Pet. App. A-2, p.2]. Petitioners say the order means just that. Respondent's Brief at page 6, N.6, states: "This claim is overstated and meritless." Respondent denies that the courts below effectively established a general rule of law prohibiting all pension funds from investing more than one-third of their assets in any given security or type of security. Petitioners submit that a federal court does not have the power to decide the law as to one person different from the law applied to other persons. To do so would be a type of tyranny by the courts and a totally uneven application of the law. The Respondent appears to sanction ad hoc determination. This is unbelievable if not stunning. The ad hoc verbiage must be indigenous to the trial court. Petitioners reject it out of hand. This Court should do likewise.

Donovan v. Guaranty Nat'l Bank, 4 Empl. Ben. Cas. 1686, 1691 (S.D.W. Va.), on its

facts has no resemblance to the case at bar. In Donovan the court was dealing solely with residential mortgages in Huntington, West Virginia, i.e., the same "class" within one "type". They were consumer loans. In the case at bar we are dealing solely with commercial real estate with personal liability of all borrowers with substantial net worths which easily distinguishes them. Further, in the Donovan Case, the Department of Labor had asked the labor union's trustees to reduce their residential mortgages to 80% some years before, which the union agreed to do, but in fact did not. Just why 80% then and 33 1/3% now no one knows. There simply is no similarity in the facts and certainly no similarity in the needed result.

If the ad hoc determination means that these petitioners don't have to obey it, then what does it mean? These petitioners have a constitutional right to be treated the same as other trustees of ERISA pension

funds. In fact, the pension fund here has done nothing but make money. Never have they lost a dollar. Never has the here pension fund failed to yield a reasonable income. Of course, petitioners wish to invest their pension fund as the Conference Report and law of trusts require with the same success they have had since 1958. They do not think that the Department of Labor, which lacks commercial experience, or the courts can tell them any better what to do. Attached hereto is a copy from The Wall Street Journal, July 27, 1988, p.21, on how brokers rate on asset-mix advice, as Petitioners' Appendix 1. It should be noted that every one of them has one or more of stocks, bonds, or cash more than 33 1/3%. The point is that in Donovan v. Guaranty Nat'l Bank, supra, where the residential mortgages were of the "same class" within the "same type", the Court limited mortgages to one-third, and then pulled the one-third

in each "class" out of a hat. The trial court here, knowing no better, substituted "class" for "type" not recognizing the difference. The Donovan Case was never appealed. It does not have the blessing of appellate scrutiny. This the Tenth Circuit should have realized but failed to do so. The limitation of one-third in any type of investment is ridiculous. If the members of the Court had to apply this one-third provision, you would find that as a practical matter it is almost impossible. The commercial world changes all the time. Payments into the pension fund and investments out of the pension fund go on continuously. To try to monitor this to the one-third of any type figure is burdensome and truly a useless waste of time. Surely there is some one with commercial sense on this Court that can recognize how absurd the decisions below are.

2. DETERMINATION ON AN AD HOC BASIS. At Pet. App. A-1, p.11, the District Court stated:

> **"The degree of concentration in any asset or in any particular type of asset which would violate ERISA is determined on an ad hoc basis,"**

apparently citing as authority therefor Donovan v. Guaranty Nat'l Bank, supra. In no place in that trial court's opinion will you find stated that a violation of ERISA is determined on an ad hoc basis. Petitioners have searched diligently and no where in legal literature do they find where a United States District Court or a United States Court of Appeals even intimate that a violation of any statute is determined on an ad hoc basis. The words "ad hoc" mean "for this specific purpose; for this case only." Webster's Dictionary, Unabridged, Second Ed. One would certainly doubt the power of a court to limit one or more of its decisions from the stare decisis doctrine. I Jurisprudence, Pound 422 (West Publishing, 1959). If the

trial court and the Tenth Circuit are saying that they are going to treat these petitioners different from other ERISA trustees, these petitioners protest vehemently. Petitioners are entitled to equal protection under the law. It is submitted that the lower court's use of and approval of the determination of this case on an ad hoc basis is in and of itself an overwhelming reason for granting certiorari. It is completely without the bounds of American jurisprudence. It is the same as saying we are going to arbitrarily decide this case which you petitioners have to follow, but no one else has to pay any attention to it. In fact, the result is so irrational that the mere statement of it demonstrates that it is nonsensical.

3. TYPE OF INVESTMENT AND CLASS WITHIN TYPE. In trust law there is simply no prohibition against investing the whole or a large proportion of trust property in one type of security or a disproportionate

amount in mortgages in a particular district on a particular class of property. House Conference Report, P.L. 93-406, No. 93-1280 reprinted in United States Code Congressional and Administrative News, 93rd Congress - Second Session 1974. The Conference Report tracks almost verbatim Restatement (Second) of Trusts [Res. T.2d], Sec. 228. The word "type" is a very broad term. One does not have to be a commercial genius to recognize that mortgages on residential real estate which are not income producing and mortgages on commercial real estate which are income producing are not the same thing. Likewise, mortgages on residential real estate insured by the Government National Mortgage Association [Ginnie Mae] and the Veterans Administration are entirely different from Freddie Mac uninsured mortgages. The mortgages on irrigated farm land are different from mortgages on dry farm land. A mortgage on

a high rise office building is of course different from a mortgage on a strip shopping mall. The same thing applies to stocks and bonds because they come in every shape, size, and description. The thrust of all this is, when you say mortgage, you may be referring to a "type", but the real guts of it is a mortgage on what, and by that we are talking "class". This elementary distinction failed to sink into the trial court and totally failed to get the attention of the Tenth Circuit. It is all aggravated by the fact that the Conference Report, supra, specifically states that the degree of investment concentration required by diversification "cannot be stated as a fixed percentage" because a prudent fiduciary must consider "the facts and circumstances of each case". We end up here with the two lower courts doing exactly what the Conference Report said should not be done. The pension funds that have relied upon the Conference Report

are endless in number. Everybody reads it and everybody tries to follow its broad outline. Why in Donovan v. Guaranty Nat'l Bank, supra, or in this instant case, should the Congressional direction be deliberately and intentionally ignored? Donovan v. Guaranty Nat'l Bank, supra, although being one "class" within one "type", held that mortgage investment was limited to one-third but otherwise not more than one-third in any one class. It is a sad commentary on the obligation of the courts to carry out the intention of the Congress. It is wrong, it is blatantly wrong, and it is intentionally wrong. The fact that the Solicitor General would put his stamp of approval on such misapplication of the law boggles the mind. He too is wrong, and the wrong should be rectified by this Court.

4. THE BORROWERS' NET WORTH NOT CONSIDERED. Respondent's Brief at page 7, N.7, admits that the District Court [also the

Tenth Circuit] did not address petitioners' contention regarding the borrowers' net worth, but goes on to say that the trial court effectively and properly disposed of that point by holding that petitioners had still exposed the Plan unnecessarily to that [sic] risk and to the risk that inflation could reduce return on their investments. This is a totally incomprehensible statement. The principal thrust of petitioners' reasoning was that these were not simple mortgage loans where reliance was placed entirely upon the collateral. Rather, each of these borrowers had exceptionally substantial net worth so that regardless of any decline in value of the properties, resort for payment could be had to the assets by way of deficiency judgment. The Tenth Circuit likewise did not discuss this crucial issue. Each of the lower courts apparently proceeded upon the theory that the real property collateral was the only thing to be considered. This

is totally and absolutely wrong. All of the borrowers are exceptionally substantial business people. These were commercial loans made on a commercial basis and not consumer loans. The risk was absolutely minimal. All investments, including U. S. Treasuries, have some degree of risk. The issue is the amount of that risk, not whether there is no risk at all. The pension fund has been making these types of loans since 1958 and has never had a delinquency. Great care has been exercised as to the quality of the borrowers. For both of the lower courts to ignore the net worth issue are failures of judicial discipline. That failure leads to a false result.

It is amusing, if not tragic, that common stocks totally lacking security are proper investments, as are corporate bonds. If any member of this Court thinks that common stocks and corporate bonds have less risk of loss than first mortgages on commercial

real estate with large net worth borrowers, it should be delineated and explained. Neither the Department of Labor nor the courts should try to substitute their judgment for that of the trustees when the trustees proven performance is impeccable.

5. NON-ISSUES, TO-WIT, LIQUIDITY, INTEREST RATE, ONE INVESTMENT, AND AREA WHERE VALUES DECLINE. Both of the lower courts seem to forget, intentionally or unintentionally, that this is a defined pension plan under 29 U.S.C. Sec. 1002(35). The only effect of higher yield on the investments, which were quite adequate here, is to make the sponsor, The Citizens Bank of Clovis, contribute less. Regardless, the fund is increased at the end of each year by the bank so as to actuarially be able to pay the fixed amount of benefits. Interest rate or return on investments is not an issue, was not plead, and no evidence presented with regard to it. It is truly a non-issue.

The Respondent's Brief brings up the issue of liquidity. Since this suit was begun, the fund has paid out $637,756.72 to beneficiaries which does not indicate a lack of liquidity. The length of these mortgages is determined by what the trustees anticipate their payments from the trust fund will be. The trustees have never had to sell any of these mortgages since 1958 in order to make payments to the beneficiaries. However, the mortgage paper is of such quality that there would be a ready market with other banks or individuals. The issue of liquidity was not raised in the pleadings, evidence was not taken on it, it was not briefed, and is a mere hallucination of the trial court. Liquidity is a true non-issue.

For some strange reason, the trial court provided that no more than one-third could be in any one investment. This is a concentration of credit in one borrower. There was not a concentration of credit in any of

the six borrowers in this case. There was no pleading in this regard and no evidence taken and no brief had with respect to the amount in one investment. It is truly a complete non-issue. The use of an injunction to forbid it is totally without any support in the evidence. How can a court enjoin these petitioners from doing something that they never did or never intended to do? Such an order is ridiculous on its face.

The trial court said that in the event of a severe economic turndown in the Clovis area, repayment of the loans just might be affected, and the value of the security backing these loans might also decline. Is it not true that a severe economic turndown any place, let alone in New Mexico, will affect all kinds of investments? On October 19, 1987, the Dow-Jones industrial average declined over 500 points, that is, some 25% plus. It hasn't regained its decline yet. One could categorically say

that severe economic turndowns in any substantial area affects other areas. But you are tremendously better off if the investments you have are substantially secured as they were in the instant case by collateral and borrowers of substantial net worth. Statements of the trial court approved by the Tenth Circuit in regard to severe economic turndowns are juvenile. The trustees here, however, insured against that by having recourse to the substantial net worths of each of the borrowers.

Petitioners have never been able to understand why, when you talk about real property mortgages, everybody equates such with residential loans to consumers. Such was not the situation here and there is no analogy to the facts in this case. A court which cannot understand the difference between "type" and "class" could hardly be expected to evaluate severe economic turndown on real property and the lender's recourse to the assets in each

borrower's individual net worth. This is a true non-issue also.

6. AN INJUNCTION IS OVERKILL.

Respondent's Brief says that the courts must use their equitable power to prevent imprudent conduct by trustees. The difficulty with this, as previously stated, was that the lower courts found that the investments made by the trustees were in fact prudent. The Conference Report says that diversification "cannot be stated as a fixed percentage". The trustees say the same thing. These trustees certainly do not seek advice of the Department of Labor or the federal courts as to what and in what amount they should invest these pension funds. It is doubted whether the Department of Labor and the courts even want that responsibility, and if they had it, they could not perform on it. Commercial bank regulators avoid it like the plague. Of course, the trustees will follow as best they can the final orders of any court. They have

never intimated otherwise. The use of an injunction with regard to these trustees is a gigantic and shameless misuse of the injunctive powers of federal courts. It is coercive to a degree nowhere merited by the facts. The Court here is not dealing with corrupt or ill advised labor union pension fund trustees. It is dealing with a bank and four people in the bank, three of whom are beneficiaries of the trust. Why on earth would the Department of Labor and the courts want to emasculate the trustees' powers when such have been an enormous success? It makes no sense. It is the purest kind of overkill.

CONCLUSION

This Court has never seen fit to grant certiorari in a case involving trustees' powers under ERISA. Such a grant is long overdue. The Department of Labor and the Courts are running rampant on this issue. Someone must give guidelines to the Department of Labor, the courts, and ultimately the

trustees of the huge amount of funds, some $1.5 trillion, now in pension trusts. This case in dollars is small. In principle, the issues are monstrous. There is neither rhyme nor reason to what the lower courts have done in this case. The issues have been summarily treated and some not treated at all. There is no excuse for such bad judging in the federal system. Petitioners believe that this Court should grant certiorari because of the effect on all pension trusts. In the absence of doing that, the case should be remanded for a retrial in the light of established trust principles.

Respectfully submitted,

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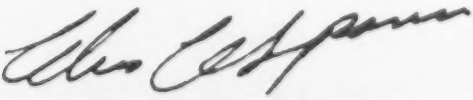
By: 

CHARLES C. SPANN

THE WALL STREET JOURNAL.

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How Brokers Rate on Asset-Mix Advice

Firms' Caution Limited Gains In First Half

YOUR MONEY MATTERS

By JOHN R. DORFMAN
Staff Reporter of THE WALL STREET JOURNAL

In Search of the Perfect Blend

Table shows the return on asset-allocation blends recommended by 10 major brokerage houses over 12-month, six-month, and 18-month periods ended June 30, 1988. Also shown is the asset mix each house currently recommends.

	RECENT PERFORMANCE			RECOMMENDED BLEND		
BROKERAGE HOUSE	12 MONTHS	6 MONTHS	18 MONTHS	STOCKS	BONDS	CASH
PaineWebber	9.6%	6.7%	20.6%	21%	59%	20%
A.G. Edwards	4.2	6.4	14.3	25	50	25
Shearson	3.1	9.3	20.1	60	35	5
Merrill Lynch	3.0	8.2	16.6	40	45	15
Smith Barney	2.2	7.9	17.3	50	35	15
Dean Witter	1.3	8.9	18.8	58	35	7
Drexel Burnham	1.0	9.3	16.9	58	25	17
Kidder Peabody	0.7	7.2	13.5	40	10	50
Thomson McKinnon	-1.3	7.2	10.8	50	10	40
Prudential-Bache	-5.4	11.9	19.4	100	0	0
Comparison Yardsticks						
Fixed blend[1]	0.3	9.0	15.1			
Stocks[2]	-6.9	12.9	18.8			
Bonds[3]	7.5	4.6	7.0			
Cash[4]	5.7	3.0	8.5			

[1]Fifty-five percent stocks, 35% bonds, 10% cash
[2]Standard & Poor's 500-stock index
[3]Shearson Lehman Hutton Inc. corporate/government bond index
[4]90-day Treasury bills

Source: Company documents, calculations by Wilshire Associates

Chocolate, vanilla or strawberry?

The investment world also offers three basic flavors: stocks, bonds, and cash equivalents. Investors generally choose a blend. But what's an easy and pleasant choice for ice cream can be a demanding task in portfolio management.

Brokers want to help. Every major brokerage house puts out advice on asset allocation, suggesting a mix of stocks, bonds, and cash equivalents that's intended to take advantage of current market conditions. But in the first half of 1988, most major brokerage houses served up a mixture that proved a bit bland.

Following the advice of the typical big brokerage house, an investor would have gained about 8% over the past six months. In contrast, an investor who simply stuck with a traditional "balanced" blend (55% stocks, 35% bonds and 10% cash) would have made 9%, according to a study by this newspaper and Wilshire Associates of Santa Monica, Calif.

Understandably, most firms began 1988 advising a smaller-than-usual equity position in the wake of last October's stock crash. But in retrospect, that caution hurt their performance. Stocks rose nearly 13% in the past six months, compared to 4.6% for bonds and 3% for cash equivalents.

Over longer periods, brokerage-house advice looks better. For the 12 months and 18 months through June 30, most houses outperformed the typical balanced blend.

Right now, the houses remain cautious. Of 10 large brokerage firms, only four recommend that investors put more than 50% of their money in stocks. Seven of the 10 suggest a cash position of 15% or more.

To evaluate the prowess of brokerage houses at asset allocation, The Wall Street Journal last year began tracking the blends recommended at each of 10 large houses (those with the largest numbers of registered representatives).

Periodically, this newspaper transmits the data to Wilshire Associates, which calculates the return that would be achieved by following the advice of each firm. Wilshire assumes that stock holdings did as well as Standard & Poor's 500-stock index, bond holdings mimicked the Shearson Lehman Hutton Inc. corporate/government bond index and cash equivalents performed as well as 90-day Treasury bills. Portfolios are rebalanced monthly and whenever a firm's advice changes. The Journal then gives the numbers to the brokerage firms, so each house can check its own data for accuracy.

In the accompanying table, the houses are ranked by their 12-month performance through June 30. Six-month and 18-month results are also shown.

PAINEWEBBER: Having urged investors to whittle down stock positions before the crash, PaineWebber Inc. led the field in both 12-month and 18-month performance. It began 1987 with a 47% allocation for stocks, but gradually cut that back to a mere 6% in late September, following the dictates of its mathematical model.

So far in 1988, PaineWebber has trailed most competitors. But Ed Kerschner, the firm's chief investment strategist, says he's not concerned. "We had lousy six-month numbers before Oct. 19," he says. "Especially before a top in any market, we're going to look pretty stupid. And also before a bottom—we're going to be buying a market a little too soon."

Right now, Mr. Kerschner thinks the stock market is near a top. "The winning market (in stocks) has gone about as far as it can go, given the current level of (interest) rates," he says. He recommends only a 21% holding in stocks.

Mr. Kerschner prefers bonds, but rising interest rates can hurt them, too. In early July, he reduced the recommended bond allocation to 59% from 68%, and raised the recommended cash position to 20%.

A.G. EDWARDS: Staying consistently cautious, A.G. Edwards & Sons Inc. has served up only small helpings of stocks in its recommended blend. That helped Edwards's performance around the crash, but hurt it otherwise. Thus, the St. Louis-based firm was second in the 12-month tally, but last in the latest six months.

Raymond Worseck, Edwards's chief economist and chief market strategist, turns up his nose at the low dividend yield offered by most stocks and expects the economy to slow. Thus, he says, "I have to

go with bonds" over stocks. He also thinks investors should keep about 25% of their money in cash equivalents, in case—as he fears—interest rates keep rising.

SHEARSON LEHMAN HUTTON: The American Express Co. unit did consistently well, finishing among the top three firms for each time period.

Unlike several competitors, Shearson Lehman Hutton strategist Michael Sherman doesn't think rising interest rates pose a "mortal threat" to the stock and bond markets. It's mainly short-term rates that have been rising, he says, and he thinks they may be lower by year's end. Thus, Shearson's recommended blend, with 60% stocks and only 5% cash, is now "pretty much at my normal level," Mr. Sherman says.

MERRILL LYNCH, SMITH BARNEY and DEAN WITTER: All three firms were around the middle of the pack in all three periods.

William Helman, director of economic and investment policy at Smith Barney, Harris Upham & Co., says, "I guess we were affected psychologically as much as anybody else by the severity of the decline in 1987. With hindsight, one would have been fully invested in equities in the recent six months. But one never has hindsight."

Charles Clough, chief investment strategist at Merrill Lynch & Co., thinks "inflation concerns are a bit overdone," and suggests that investors may want to begin buying some longer-term bonds.

At Dean Witter Reynolds Inc., a unit of Sears, Roebuck & Co., chief investment strategist John Connolly recommends more stocks than bonds but is getting edgy as interest rates rise. "Bond rates are beginning to present a challenge to the equity market," he says.

DREXEL BURNHAM: After neglecting to duck before the crash, Drexel Burnham Lambert Inc. did well in the latest six months, adroitly zigzagging on bonds while keeping a substantial position in stocks.

The day after the crash, Drexel Burnham increased its recommended bond position to 32%, and thus caught a brisk bond rally that started because of fears of a recession. By February, says Abby Joseph Cohen, investment policy analyst, "many investors were thinking in terms of a recession. Our feeling was that there was not going to be (one) and that credit demands would be stronger than most people thought." So the firm cut back on bonds to 25%, just in time to mitigate the damage from a weak bond market in the spring.

KIDDER PEABODY: The General Electric Co. unit ranked in the bottom half for all three time periods. Like A.G. Edwards, only more so, Kidder, Peabody & Co. has been playing it safe. Joseph Fuchs, director of research, says the firm's "risk-averse" stance has stemmed from its "concerns about interest rates, the dollar, the economic outlook and the volatility of financial markets world-wide." Kidder's huge recommended cash position—50% since Feb. 10—limits risk but also cuts the chances for any major gains.

THOMSON MCKINNON: Having sometimes zigged when it should have zagged, Thomson McKinnon Securities Inc. was the only firm that didn't outperform a typical fixed blend in any of the three periods.

For example, it cut its allocation for stocks to 35% in February, just as stock prices were turning up, then raised the allocation to 60% in April, just as they were turning down. On the bond side, Thomson had light allocations in January and June, when bonds rallied, but raised the allocation in between, when bonds slumped.

Right now, Thomson has cut its bond allocation to just 10%. With the Federal Reserve tightening credit, the drought pushing up commodity prices and factories nearing their capacity limits, "you don't want to have anything to do with long (term) bonds," says Brian Fabbri, Thomson's chief economist and market strategist.

PRUDENTIAL-BACHE: Perhaps Prudential-Bache Securities Inc. should lay claim to the slogan "bullish on America," now that Merrill Lynch isn't using it any more. For more than a year, Prudential-Bache investment strategist Greg Smith has recommended a 90% position in stocks, while disdaining bonds. This month he went even further—recommending 100% stocks, no bonds and no cash for people whose investment guidelines permit a lopsided commitment to one asset.

The results of the firm's extremely bullish posture have been mixed. Prudential-Bache looked bad over the latest 12 months because it led with its chin during the crash. But it topped all firms in the past six months and was among the leaders over 18 months. Mr. Smith, who couldn't be reached for comment, wrote earlier this month that stable or lower oil prices, plus a stronger dollar, mean good times ahead for equities. The "*manana* recession," he wrote, "keeps getting postponed."